IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19-9-2007

Coram

The Honourable Mr.Justice S.J.MUKHOPADHAYA
and
The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

W.A.No.1971 of 2003
W.A.M.P.No.2796 of 2003

M/s.The Indian Hume Pipe Co Ltd.,
Madurai. ... Appellant

Vs.

1. The Presiding Officer,
Employees Provident Fund Appellate Tribunal,
7th Floor, 60 Skylark Building,
Nehru Place,
New Delhi - 110 019.

2. The Regional Provident Fund Commissioner,
Office of the Regional Provident Fund Commissioner,
Lady Doak College Road,
Chokkikulam,
Madurai - 625 002.

3. The Enforcement Officer,
Office of the Regional Provident Fund Commissioner,
Lady Doak College Road,
Chokkikulam,
Madurai - 625 002. Respondents

This Writ Appeal has been filed under Clause 15 of Letters Patent against the order of the learned single Judge in W.P.No.2781 of 2000 dated 14.2.2003.

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W.P.No.2781 of 2000:= Presented to this Court under Article 226 of the Consideration of India, praying to issue a writ of certiorari to call for the records on the file of the first respondent presiding officer, employees provident fund Appellate Tribunal, New Delhi, pertaining to case No. ATA/13 (14)/99 dated 26.11.1999 and quash the same.

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For Appellant	:	Mr.Ramaswamy for Mr.V.Mani
1st Respondent	:	Tribunal
Respondents 2 & 3	:	Mr.V.Vibhishanan

J U D G M E N T

N. PAUL VASANTHAKUMAR, J.

This writ appeal is directed against the order passed by the learned single Judge in W.P.No.2781 of 2000 dated 14.2.2003, dismissing the writ petition filed by the appellant herein.

2. The brief facts necessary for disposal of the writ appeal are that the appellant Company was established during the year 1926 and is engaged in the manufacture, sale and laying of various types of cement, concrete pipes, penstock pipes, railway concrete sleepers, etc. The Company is having 25 factories and projects all over India and the said factories were established as the pipes are heavy and bulky to avoid transportation for a long distance, so that it can cater to the needs of the nearby areas. The appellant Company established a factory in the place called Silaiman near Madurai for manufacture and supply of pre-stressed concrete pipes. The Tamil Nadu Water Supply and Drainage Board, gave an order to the appellant for laying pipes from Vaigai Dam to Andipatti, to the distance of 30 Kms. The appellant executed the contract work from December, 1993 to January, 1995. The laying of pipeline was entrusted to different contractors. The appellant was served with a show cause notice by the respondents and called upon to furnish particulars. The appellant contended that the Employees Provident Fund and Miscellaneous Provisions Act and Employees State Insurance Act have no application to the factory at Madurai or to the execution of the work of laying pipelines. It was further stated that the work was executed for a sum of Rs.5,11,41,709/- through independent contractors and as such no contribution is payable. The second respondent however held that the appellant is liable to contribute towards Provident Fund contribution and insurance charges to the tune of Rs.5,54,811.10 by order dated 7.9.1997. The appellant, having aggrieved, challenged the said order by filing an appeal before the Employees Provident Fund Appellate Tribunal and by order dated 9.2.1998, the Appellate Tribunal set aside the order of the second respondent and remitted the matter

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to give fresh hearing by summoning the sub-contractors to produce records in respect of the employees, who were engaged in laying of the pipes. Thereafter, the second respondent issued summons to the Sub-Contractors as well as to some of the employees and considered the matter and thereafter passed an order on 25.2.1999 holding that the appellant is liable to pay a sum of Rs.11,50,323/- in respect of contribution towards Provident Fund, Family Pension Fund, Administrative charges, etc. The said order was again challenged before the Employees Provident Fund Appellate Tribunal by filing appeal bearing Case No.ATA/13(14)/ 1999. The said appeal was also dismissed by order dated 26.11.1999.

3. The said order of the second respondent dated 25.2.1999, confirmed by the first respondent on 26.11.1999 were challenged by the appellant before this Court in W.P.No.2781 of 2000 and the learned single Judge dismissed the same by order dated 14.2.2003 by holding that the original authority as well as the appellate authority, after analysing the entire evidence, came to a factual conclusion in appreciation of material evidence and the same cannot be interfered with under Article 226 of Constitution of India as there is no error of jurisdiction nor there is any illegality or infirmity in the said orders. As against the said dismissal of writ petition, this writ appeal is preferred.

4. The learned counsel appearing for the appellant submitted that even after remand made by the appellate authority, the second respondent failed to appreciate the contention of the appellant that laying of the pipeline was made through contractors and the contractors have also filed affidavit to prove the same, but still the second respondent erroneously fixed the liability on the appellants, which was confirmed by the first respondent as well as the learned single Judge and therefore the said orders are liable to be set aside by remanding the matter to the second respondent for fresh consideration. The learned counsel also submitted that the Cement Industry, manufacturing the pipes, owned by the appellant is different from laying pipeline from Madurai to Theni, for which TWAD Board granted permission and the pipelines having been laid by the contractors, they are entitled to have infancy period and non-consideration of the above aspect by the respondents vitiates the entire proceedings. The learned counsel also submitted that the workmen, who are to be given the benefit are not identified and the respondents have not assessed the liability of the appellant in the manner known to law and therefore prayed for setting aside the orders passed and remit the matter.

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5. The learned counsel for respondents 2 & 3 submitted that the original authority and the appellate authority factually found that the appellant is liable to pay the amount and the learned single Judge rightly refused to go into the disputed facts in the writ petition filed under Article 226 of Constitution of India. The learned counsel submitted that the workers are identified, whose names find place in Annexure-A of the order passed by the second respondent dated 25.2.1999, and that the alleged sub-contractors are not independent contractors and they are getting the cement pipes only from the appellant even as per the agreement said to have been entered into by the appellant Company with the contractors dated 6.3.1989 and the liability to pay the statutory dues, even though fixed on the contractor in case of non-payment, the appellant Company is entitled to recover the same from the contractor as per the provisions of the Employees Provident Fund Act, 1952, and the scheme thereunder. On the basis of the said submissions the learned counsel prayed for dismissal of the writ appeal.

6. We have considered the rival submissions made by the learned counsel for the appellant as well as respondents 2 and 3.

7. The point for consideration is whether the order passed by the second respondent as confirmed by the first respondent is just and proper and whether the learned single Judge is right in dismissing the writ petition.

8. Admittedly the appellant Company was established during the year 1926 and engaged in the manufacture of re-inforced cement concrete pipes, etc., throughout India and established several factories all over the country. The TWAD Board entrusted the work of laying pipes from Vaigai Dam to Andipatti in the then Madurai District, to the appellant and the appellant executed the contract from December, 1993, and completed the same in January, 1995. It is true that the earlier order passed by the second respondent demanding a sum of Rs.5,54,811.10 was challenged by the appellant and the first respondent appellate authority set aside the same and remitted the matter to re-determine all the dues, after impleading the sub-contractors. Thereafter the appellant was directed to submit written statement with reference to the dues payable by the establishment in respect of the employees employed through the contractors, for which the appellant filed written statement on 9.9.1998. The learned counsel appearing for the appellant before the second respondent further stated that M/s.CEC and M/s.Namperumal & Co., are separate establishments functioning independently with permanent employees for various purposes and they are to be treated as

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Principal Employer. The learned counsel also submitted written arguments and stated that the assessment proceeding may be closed as no document is available to ascertain the payment of salary to each workers. The learned counsel appearing for M/s.S.Ganapathy and S.Danasekar submitted that they are only employees of the appellant Company and they were doing the work of Maistry and they used to receive the amount for the purpose of disbursing wages to the employees engaged by the Maistry on behalf of the Principal Employer viz., the appellant. Similarly the learned counsel for M/s.Namperumal & CO., also stated that it is the duty of the appellant Company to make contributions in connection with the employees. Section 7A of the Employees Provident Fund Act deals with determination of moneys due from employers and the procedures to be followed during determination.

9. We could see from the order of the second respondents that the appellant, who is the Principal Employer, failed to produce records to contradict the records produced by the contractors. The Contractors also failed to produce the attendance register and wage register of the employees engaged by them on behalf of the appellant Company and stated that they were not maintaining any such record and certain employees were summoned by the enquiry authority to find out the truth and some of them appeared and supported the document filed by the contractors. Whether the contractors, whose companies were not coverable as on that date and were enjoying infancy and whether they should be treated as Contractors or Maistries could not be decided by the second respondent as no documentary evidence was produced to ascertain their status.

10. The above said facts clearly proved the non co-operation of the appellant to deny the liability and the second respondent proceeded to fix the quantum by way of best assessment. In similar matter with regard to determination of contribution payable under section 45A of Employees State Insurance Act, the Supreme Court in the decision reported in (2007) 1 SCC 584 (ESI Corpn. v. C.C. Santhakumar) held that on non co-operation, best assessment order can be passed. In paragraph 15, the Supreme Court held thus,

> "15. Section 45-A provides for determination of contributions in certain cases. When the records are not produced by the establishment before the Corporation and when there is no cooperation, the Corporation has got the power to make assessment and determine the amount under Section 45-A and recover the said amount as arrears of land revenue under Section 45-B of the Act. This

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> is in the nature of a best-judgment assessment as is known in taxing statutes. When the Corporation passes an order under Section 45-A, the said order is final as far as the Corporation is concerned. Under Section 45-A(1), the Corporation, by an order, can determine the amount of contributions payable in respect of the employees where the employer prevents the Corporation from exercising its functions or discharging its duties under Section 45, on the basis of the material available to it, after giving reasonable opportunity. But, where the records are produced, the assessment has to be made under Section 75(2)(a) of the Act. Section 45-A(2) provides that the order under Section 45-A(1) shall be used as sufficient proof of the claim of the Corporation under Section 75 or for recovery of the amount determined by such order as arrears of land revenue under Section 45-B. In other words, when there is a failure in production of records and when there is no cooperation, the Corporation can determine the amount and recover the same as arrears of land revenue under Section 45-B. ....."

11. In this case, the Enquiry Authority assessed the amount on the basis of the list of employees furnished by the contractors and the quantum of amount paid to each of them. Since there was no contra evidence produced by the Principal Employer viz., the appellant the said amount was assessed as dues and the list of employees and the wages paid was also appended as Annexure-A.

12. We have also perused the agreement said to have been entered into by the appellant with the Namperumal & Co., wherein in clause 28 it is stated that if the contractor fails to pay the lawful dues as per the provisions of Employees Provident Fund Act, 1952, the appellant Company is entitled to recover the same from the contractor from his bill. The said clause in the agreement clearly establishes the liability to pay Employees Provident Fund Contribution to its employees either by the contractors or by the appellant/principal Employer.

13. The appellate authority also found that the appellant being a Construction Compnay, its employees are liable to pay Provident Fund contribution under section 1(3)(b) of the Act and even according to the appellant company, it is having a factory to manufacture pipes and they have taken the project of laying

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down the pipes. The second respondent having given reasons for accepting the documents filed by the Contractors and the appellant Company being the Principal Employer having failed to maintain necessary records and to ensure regular payment, was required to pay the contribution to its employees. The learned appellate authority also found that the contract said to have been made by the appellant with the sub- contractors are not genuine as the amount paid to the sub-contractors discloses only wages and salaries and not higher than the amount other than the wages paid. No document to disprove the said finding is produced either before the original authority or before the appellate authority. The number of workers having been identified as per Annexure-A by the second respondent, the appellate authority rejected the contentions of the appellant and dismissed the appeal.

14. The learned single Judge having found that only factual disputes were raised by the appellant before the second respondent as well as the first respondent and the same having been found factually against the appellant, refused to interfere in the writ petition filed under Article 226 of Constitution of India. We are in entire agreement with the reasonings and conclusions arrived at by the learned single Judge.

15. In the decision reported in (1997) 6 SCC 650 (Ahmedabad Municipal Corporation v. Virendra Kumar Jayantibhai Patel), the Supreme Court considered the scope of article 226 and held thus,

> "High Courts under Article 226 of Constitution are entitled to issue directions, writs and orders for correcting the record of the inferior Courts or the tribunal. It is true that the High Court while exercising its jurisdiction under Article 226, cannot convert itself into a Court of appeal and assess the sufficiency or adequacy of the evidence in support of the finding of fact reached by the competent Courts or the tribunals, but this does not debar the High Court from its power to enquire whether there is any evidence in support of a finding recorded by the inferior Court or tribunal. There is a difference between a finding based on sufficiency or adequacy of evidence and a finding based on no evidence. If the finding of fact recorded by the tribunal is based on no evidence, such a finding would suffer from error of law apparent on the face of record."

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16. In view of the above finding of fact by the second respondent as confirmed by the first respondent in the appeal, we are also of the view that the said findings of fact cannot be interfered with under Article 226 of Constitution of India and the said findings are not proved as perverse finding. The learned single Judge is perfectly justified in refusing to interfere with the said finding under Article 226 of Constitution of India and dismissed the writ petition.

17. There is no merit in the writ appeal and the same is dismissed. The order of the learned single Judge in W.P.No.2781 of 2000 dated 14.2.2003 is confirmed. No costs. Connected miscellaneous petition is also dismissed.

vr

Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Presiding Officer,
   Employees Provident Fund Appellate Tribunal,
   7th Floor, 60 Skylark Building,
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+ 1 cc to Mr. V. Mani, Advocate SR No. 58331/07

Judgment in
W.A.No.1971 of 2003

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